INDEX

	Page
Statement	1
Complainant's exceptions:	
I	6
II	8
III	15
IV, V, and VI	17
VII and VIII	18
IX	19
Conclusion	23

CITATIONS

Cases:	
French-Glenn Live Stock Co. v. *Springer*, 185 U. S. 47	14
Jeems Bayou Club v. *United States*, 260 U. S. 561	13
Lee Wilson & Co. v. *United States*, 245 U. S. 24	13, 14
Moss v. *Ramey*, 239 U. S. 538	13
Niles v. *Cedar Point Club*, 175 U. S. 300	15
Statutes:	
Chapter 278, General Laws of Oregon, 1917, p. 518	2
Chapter 280, General Laws of Oregon, 1921, pp. 521–523	2
Chapter 282, General Laws of Oregon, 1923, pp. 435–437	2
Chapter 228, General Laws of Oregon, 1931, pp. 358–360	2

111635—35——1

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 13, Original

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

THE STATE OF OREGON, DEFENDANT

BRIEF FOR THE UNITED STATES IN SUPPORT OF ITS EXCEPTIONS TO THE MASTER'S REPORT

STATEMENT [1]

This is a suit in equity to quiet all titles and claims asserted by the State of Oregon to the Lake Malheur Reservation Area in Harney County, Oregon. The suit was begun by filing of complaint in this Court on November 24, 1930.

The Lake Malheur Reservation was established August 18, 1908, by President Theodore Roosevelt. (See Executive Order with plat opposite page 1

[1] The joint Abstract of the Record of the evidence taken before the Special Master is hereinafter abbreviated A. R. The report of the Special Master is hereinafter abbreviated S. M. R.

S. M. R.) This order was made "subject to valid existing rights" and was not intended to affect any lands other than those of the United States.

By Laws of 1917, page 518; Laws of 1921, page 521; Laws of 1923, page 435; Laws of 1931, page 358 (see Supplement to S. M. R., pages vi to xiv), the State of Oregon asserted title to the beds of navigable lakes; declared all meandered lakes to be navigable; declared its sovereignty and ownership of such meandered lakes and of all lands between ordinary high and low-water marks; authorized the State Land Board to sell such lands to settlers within such areas; to grant to owners of lands bordering upon the Malheur, Harney and Mud Lake meanders 160 acres of such state lands, chiefly valuable for agricultural purposes; and to enter into agreements with the United States with reference thereto but without recognition of any title or interest in the United States below or within the meander lines of any meandered lake prior to a conveyance from the State Land Board to the United States.

These statutes and other Acts and assertions of the claim of the State of Oregon that it, and not the United States, had jurisdiction to dispose of and regulate the uses of the Lake Malheur Reservation area, so embarrassed the United States Department of Agriculture and the Biological Survey in its relations with the many settlers permissively cutting hay and grazing stock within the

Reservation, that it became necessary to obtain a final determination of the claims of Oregon.

The Senate and House of Representatives at the 71st Congress, 2d Session, approved H. R. 1198, being an Act to authorize the United States to be made a party defendant in any suit or action brought by the State of Oregon in the United States District Court for the District of Oregon, for the determination of the title to the lands here in question, and authorizing all persons claiming to have an interest in said lands to be made parties or to intervene in said suit or action, and conferring jurisdiction on the United States courts over such cause.

On June 6, 1930, the President of the United States returned this Bill, without approval, for the reasons stated in a letter from the Attorney General to the President, reading in part as follows:

> * * * The Supreme Court of the United States has jurisdiction to entertain suit by the United States against the State of Oregon to try the title to the beds of these lakes and to determine whether they are navigable and whether the title passed to the State upon its admission to the Union. The United States district court also has jurisdiction to entertain suit by the United States against individuals holding under patents from the United States and which would determine whether any part of the beds of the streams passed to the patentees if the lakes are nonnavigable. There might

be some advantage if a tribunal existed in which all the parties might appear in one suit, but because of these questions as to the validity and effect of this bill, instead of avoiding confusion and simplifying litigation this bill, if it becomes a law, would raise new controversies and increase the confusion. If the existing facts are such as to show a substantial controversy over these matters, the proper course in my opinion is for the United States to bring a suit against the State of Oregon in the Supreme Court to try the question as to navigability. Even though the individual patentees or others claiming an interest in the beds of the lakes or in the waters thereof are not parties to such a suit, the practical effect of the decision of the Supreme Court would be to settle the question of navigability. So far as the controversy between the patentees and the United States is concerned, following the determination of such a suit in the Supreme Court or pending it, suit could be brought in the United States district court against the individuals involved. The wise course for all concerned is to disapprove this bill and leave initiation of the litigation to the United States and let it be determined in tribunals which now have jurisdiction. (Supplement to S. M. R. iv–v.)

This suit was brought in furtherance of the plan suggested in the Attorney General's letter to the President, *supra*. It is constantly to be borne in mind that the only issues before this Court are

the relative rights and jurisdictions of the State of Oregon and of the United States, with respect to the lands in question. Any controversy as between the United States and the patentees of adjacent lands claiming riparian rights (S. M. R. 11), or between the United States and settlers within the reservation who have been permissively using the lands for agriculture (S. M. R. 11), are reserved for adjudication in the United States District Court.

In this action the United States asserted that the Reservation was not navigable water when Oregon was admitted to the Union in February 1859 and hence the title to the beds of the lakes remained in the United States and is still the property of the United States. The State of Oregon contended that the area in question passed to the State upon its creation, as navigable water covered land; and also that the running of meander lines by the United States and the issuance of patents to lands bordering thereon constituted an abandonment to the State of all lands within such meanders.

The controversy was referred to Garret W. McEnerney, Esquire, of San Francisco, California, as Special Master, who held hearings for the taking of testimony at Burns, Oregon, in November 1931. The case was argued before the Master in November 1933. The Master's report, dated July 28, 1934, was filed October 15, 1934.

The Master found generally, for the United States and against the State of Oregon, that title

to the area did not vest in the State under its navigability claim, and also that the United States had not abandoned any lands to the State because of the running of the Neal survey lines and the issuance of patents to lands adjacent thereto.

The State of Oregon and the United States have both filed exceptions to the Master's report. This brief deals only with the exceptions filed by the United States.[2]

COMPLAINANT'S EXCEPTION I

The complainant excepts to that part of the Special Master's report on page 27 wherein he finds that—

> the United States challenges the correctness of the Neal line as a whole (81.098 miles).

The Master should have found that the State of Oregon asserted the correctness of such line, which the United States denied, and took the position that the correctness of the Neal line was not an issue (S. M. R. 26).

While the complaint herein alleged that the 1895 survey lines were not the true boundaries of Malheur, Harney and Mud Lakes and the Narrows (S. M. R. 7), and the State in its counterclaim asserted the correctness of such lines as meanders, yet when the case came on for trial both parties agreed that

[2] A more complete statement of the case will be made in the brief for the United States to be filed in reply to the brief for the State of Oregon in support of its exceptions to the Master's report.

this question was not an issue in the case, and proceeded upon this basis. In this connection see the following portions of the joint Abstract of the Record:

> (A. R. 239–240): Mr. LILJEQVIST. Personally, I have felt, and will urge before Your Honor and the Supreme Court, that this question of the Neal Line, where he ran it, is not an issue in this case. I think neither under the pleadings, nor the facts, can they challenge the accuracy of that survey. That is my position, and has been.
>
> Mr. BLACKMAR. I do not want to be misunderstood about (R. 2479) this matter, and I do not want anything that I have said in this (R. 2480) case to commit the Government to the position that the Neal meander line was correctly run.
>
> SPECIAL MASTER. I know your point seems to be that there may be grave doubts about that, but you are not going to have a controversy over that in this case.
>
> Mr. BLACKMAR. I do not think it is an issue in this case.
>
> Mr. LILJEQVIST. All right, I will let it rest right there (R. 2480).
>
> (S. M. R. 26): At the hearing at Burns, Oregon, November 1931, the United States took the position that the correctness of the Neal line was not an issue, although not conceding that it was a correct line (Joint Abstract of Record, Vol. 1, p. 239). The course of testimony thereafter indicated, or

might be interpreted to indicate, that the State of Oregon had abstained from offering proof to support the correctness of the Neal survey upon the assurance of the United States that the question was not an issue in the case.

Later, I concluded that the argument of the State of Oregon respecting the effect of grants of the United States to upland proprietors bordering on the Neal meander line rested upon the correctness of that line and that it was not appropriate to leave the state of the proofs in the then condition.

Accordingly, I notified counsel that if necessary the case would be reopened for additional evidence respecting the correctness or incorrectness of the Neal survey. The result was that at the commencement of the argument at San Francisco, October 30, 1933, counsel agreed that no evidence upon the issue, which had not been offered, was available to either side (see Transcript of Argument, October 30, 1933, page 2497).

The State of Oregon also excepts (Defendant's Exception No. 60) to this finding by the Special Master.

COMPLAINANT'S EXCEPTION II

The complainant excepts to that part of the Special Master's report on pages 26, 27, 28, and 98 (finding XIII), wherein he finds that—

> The meander lines run by Neal were correctly run and properly laid down, made in good faith and without fraud or gross error

> or mistake, and have ever since their approval remained unimpeached and constitute a correct establishment of the meander lines surveyed by him.

The United States contends that the above finding is not necessary to a solution of this case.

If this Court finds that the lakes are nonnavigable, Oregon has no interest therein. A decree would then be in order quieting the title of the United States to all of Lake Malheur Reservation within the meander line, and dismissing Oregon's counterclaim. The correctness of the Neal meander line is therefore not an issue.

The Master has found that Oregon has no ownership within the Malheur, Harney, and Sand Reef Divisions. See the following:

> Oregon has no claim whatever in the Malheur Lake Division * * * [S. M. R. 67].

> As it is held that the Executive Order was valid as of its date, the United States owns all of the Sand Reef Division within the Meander Line Boundary except such as may belong to the two patentees aforesaid or their successors whose rights will not be adjudged herein in their absence (S. M. R. 71).

> From the foregoing it follows that the United States is the owner of all the interests in Harney Lake Division except the interest of the above patentee, John C. Clement, or his successors, which it would not be appropriate to determine in his absence (S. M. R. 72).

Since, therefore, Oregon has no ownership in the Malheur Lake Division, as found by the Master, this finding (XIII) is not necessary; and it is prejudicial to the United States in its relations and dealings with the owners of patented lots adjacent to the Neal lines.

It is not desirable that either the riparian claimants or the settlers should be prejudiced unnecessarily by anything said or done in this case. The United States does not desire a determination in this case of any question or controversy between the United States and either group of these claimants. It desires to deal justly with them, and afford to them ample opportunity to obtain in the District Court an adjudication of all possible claims of ownership that they or any of them may desire to assert.

The United States has not consented to be sued either by these private claimants or by the State of Oregon in their behalf. In this case it is desired only to dispose of all claims asserted by the State of Oregon, in order that the United States may deal directly with these private claimants.

It is important to settle in this case the question of authority, i. e., whether it is the State of Oregon or the United States which has authority to issue patents or permits within this Reservation area. The issues and facts determined should be limited strictly to the necessities of this case, and the decree should be without prejudice to any private right, title, claim, or interest.

The United States contends that this finding is contrary to the evidence. In connection with his ruling as to the correctness of the Neal line, the Special Master stated as follows (p. 28):

> It is true that the United States produced engineers of oustanding ability and reliability to impeach the Neal Line. These engineers enjoyed the benefit of the advance in the science of cadastral engineering over a period of thirty years (1895–1931) and had the history of the region through that length of time at their command. * * *

The Special Master was referring to the testimony of Mr. Chester W. Pecore, a cadastral engineer in the United States Bureau of Biological Survey, called as a witness for the plaintiff. Mr. Pecore described at length (A. R. 105–107) the survey made under his direction in 1931, of the region to which the present suit relates. Testifying particularly as to the correctness of the Neal meander line (A. R. 185–186), Mr. Pecore stated in part as follows:

> * * * I do think Mr. Neal made a very serious misjudgment as to where the meander line should have been put, and especially along the north and west side of the lake. That is my judgment many years after the survey was made and after I have handled perhaps a hundred similar cases in the Interior Department. I am not saying where I would have run that line, either straight across the lake, farther north or farther

south, but I could give it on that map, Plaintiff's (R. 2278) Exhibit No. 3, together with my reason (R. 2278).

I believe that the Neal meander line along the north side of Malheur Lake, for example, in T. 25, S., R. 32½ E., should have been run in one place nearly two and a half miles farther south than he ran it.

In addition to the scientific evidence given by the expert, there is also abundant lay evidence showing conclusively that the Neal line was not a true meander line. It was shown that numerous settlers lived within the Neal line (A. R. 224–225); that they engaged in agriculture and stock raising (A. R. 194–203, 208–219, 224–228, 237–238, 353–355, 364–370, 375–380, 387–392). At the time of the survey there were within sight of the surveyor thousands of tons of hay in stacks within the Neal meander line (A. R. 201–203, 210–215). In this connection further references to the joint Abstract of Record are made as follows: 140–1, 185–6, 190–2, 204–7, 220–1, 223–8, 232, 236–8, 352, 355–7, 362–5, 374, 393, 397, 418, 423, 426, 432–3, 438, 440, 443, 445–6, 448–9, 461, 464, 469–470, 472, 480–1, 483–5, 488, 491, 498–9, 504, 514–16, 520, 522, 524, 532, 534–5, 547, 553–5, 562, 567, 571–3, 575–6, 581, 585, 588, 594–5, 601–2, 605–7, 613.

The correctness of the Neal line is further refuted by the existence of numerous islands within the meander line, Pelican Island with an area of 840 acres when the water reaches an elevation of

4,093 feet (A. R. 135); Cole Island, with an area of 350 acres at the same water elevation (A. R. 135, 293). It was testified that the two islands mentioned have never been completely submerged (A. R. 275 *et seq.*). There are numerous other islands within the Neal meander line, the total exposed area, at the water elevation mentioned, being 8,000 acres (A. R. 135, 315). A drop of one foot in the elevation of the water increases the land area to 19,733 acres (A. R. 134–137).

It was obviously error on the part of surveyor Neal to designate as a lake such large and substantial tracts of land as the evidence herein shows existed at the time of the survey (A. R. 184, 186). *Lee Wilson & Co.* v. *United States,* 245 U. S. 24; *Jeems Bayou Club* v. *United States,* 260 U. S. 561, and *Moss* v. *Ramey,* 239 U. S. 538.

The error in the meander line may be corrected:

There is no merit in the contention of counsel for the State of Oregon herein that the United States is estopped to question the accuracy of the Neal meander line "because the Government has accepted the survey to the part that was surveyed, patented it, and received payment for it * * *" (A. R. 186). Decisions of this Court establish conclusively that where, as here, a survey is later found to be erroneous, it may later be corrected, and the mere fact that the Land Department accepted the survey at the time does not bind the Government as to future action with reference to its cor-

rection. The correctness of a survey is a question of fact which may be reviewed when presented in a proper case. In *Lee Wilson & Co.* v. *United States*, 245 U. S. 24, 31, this Court stated as follows:

> The assertion that an estoppel against the United States arose from the fact that the administrative officers of the government before the discovery of the fraud or error as to the existence of the lake had treated the area meandered as subjected to the riparian rights of the abutting owners under the state law and consequently not subject to be disposed of by the United States, in substance but disregards the right to correct such error conclusively recognized as existing in the administrative officers of the Land Department by the [following] decisions * * *.
>
> [P. 29.] *Niles* v. *Cedar Point Club*, 175 U. S. 300; *French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 47; *Security Land & Exploration Co.* v. *Burns*, 193 U. S. 167; *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District*, 232 U. S. 186.

In *French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 47, it was stated as follows (at p. 51):

> * * * We agree with the Supreme Court of Oregon in thinking that the question whether the northern boundary of the lots of the plaintiff in error was an existing lake, the recession of whose waters would leave the bed of the lake, thus laid bare, to

> accrue to the owner of the lots, was a question of fact which was not concluded by a mere call for a meander line. * * *.

In *Niles* v. *Cedar Point Club*, 175 U. S. 300, this Court said (at page 308):

> But, it is urged, that the fact that a meandered line was run amounts to a determination by the land department that the surveyed fractional sections bordered upon a body of water, navigable or non-navigable, and that, therefore, the purchaser of these fractional sections was entitled to riparian rights; * * * But there is no such magic in a meandered line. All that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary there may be found forest or prairie, land or water, Government or Indian reservation.

COMPLAINANT'S EXCEPTION III

The complainant excepts to that part of the Special Master's report on page 98 (finding XIII), wherein he finds—

> In his survey Neal ran a continuous but unclosed meander line at different elevations and without contours (which in no way impairs the correctness of his survey), extending a distance of 81.098 miles on both sides of what are herein called (1) Malheur Lake Division; (2) Narrows Division; (3) Mud Lake Division; (4) substantially the whole of Sand Reef Division and (5) a negligible portion of Harney Lake Division.

This finding is irrelevant and immaterial and is not sustained by the evidence, as pointed out under Exception II.

If any finding on the subject was warranted, the Master should have found:

(1) That the Neal lines were correctly run as traverse lines, but did not follow the meanders and shores of Malheur Lake nor the water levels thereof;

(2) That in running said lines he attempted to approximate the mean high water flood lines thereof, leaving unsurveyed large areas of adjacent land, and also islands and promontories of equal elevation belonging to the United States which were then and now are capable of agricultural uses, and were and now are occupied and used as such;

(3) That the occasional or annual spring flooding thereof due to melting snow is but temporary, and in every year such waters recede from the lands which they may cover, leaving such areas benefited and irrigated thereby;

(4) That with an annual rainfall of only 8.6 inches to 10 inches and an annual evaporation of 40 inches (S. M. R. 113), it is obvious that in a shallow flat lakebed area such as that of Malheur, a normal spring flood-water level of 4,093 feet would necessarily recede in every year, leaving valuable land capable of agricultural uses neither applied for nor granted to homestead or other applicants;

(5) That with a certain recession of 30 inches (4,093 feet minus 40 inches of evap-

oration plus 10 inches of rainfall) from the 4,093-foot level, there would be left dry 11,715.8 acres of one foot water covered land, and 10,126.6 acres of one to two foot water covered land, and about half of 6,988.4 acres of two to three foot water covered land (S. M. R. 119), or a total of more than 25,000 acres of agricultural land belonging to the United States within these so-called "meanders", in addition to the 7,991.6 acres of island and promontory land above the 4,093-foot level.

COMPLAINANT'S EXCEPTIONS IV, V, AND VI

IV. The complainant excepts to that part of the Special Master's report on page 118 (finding XXII) wherein he finds that—

> all of the lands within the five Divisions below the elevation of 4093, * * * are "lake bed land" and/or "the bed of lakes",

because not sustained by the evidence.

V. The complainant excepts to that part of the Special Master's report on page 118 (finding XXII) wherein he finds that—

> the line of ordinary or mean high water at the time of the Neal Survey in 1895–1896 and on February 14, 1859, was at a mean elevation of 4,093 feet above sea level and was so fixed by Neal—

because not sustained by the evidence, and because it is not necessary that the question be determined in this case.

VI. The complainant excepts to that part of the Special Master's report on page 129 (finding XXX) wherein he finds—

> * * * but it is true that with waters at the ordinary high-water mark (4,093 feet) the entire bed within the Meander Line Boundary would be covered—

because not sustained by the evidence.

The evidence shows that the lands on both sides of the Neal line averaged at 4,093 feet elevation are of the same character, irrigated by a spring flood resulting temporarily from melting snow, and useful for grazing and hay cutting each year, after the flood waters have receded.

> See A. R., pp. 194–195, 201, 207, 210–213, 215–216, 223, 225, 228, 236–238, 432–433, 443, 445–446, 464, 514.

COMPLAINANT'S EXCEPTIONS VII AND VIII

VII. The complainant excepts to that part of the Special Master's report on page 31 wherein he finds that—

> The patents to the uplands in this case are substantially, if not identically, in the form of those involved in *Hardin* v. *Jordan*.

for the reason that such finding is irrelevant and not necessary to a determination of the issues between the United States and Oregon.

VIII. The complainant excepts to that part of the Special Master's report on page 35 wherein he finds:

> I find nothing in the law of Oregon to show that there has been any departure in that State from the common law as announced in *Hardin* v. *Jordan* and *Kean* v. *Calumet Canal Co., supra,* whereunder a grant of uplands in particular form invests the grantee with title from the water's edge to the center of the lake.

This finding does not aid in the solution of any issue between the United States and Oregon. The effect of the patents to land adjacent to the Neal lines is a matter entirely between the United States and its patentees. The State of Oregon would have no interest in the Malheur Lake Division, whether a patent stops at the water's edge or goes to the center of the lake. It is not necessary to make such a finding in this case to determine that Oregon has no title under either its navigability or abandonment theories.

COMPLAINANT'S EXCEPTION IX

The complainant excepts to that part of the Special Master's report on page 67 wherein he finds:

> 3. In any event the United States is the owner of 20.20% (or some equitable approach thereto) of the bed of Lake Malheur held in common with owners of upland.

Having found that Oregon has no interest in the Malheur Lake Division (S. M. R., p. 67, Section 4), it is not necessary that the Master should have held

that the United States owns in common with upland owners 20.20%, or any other percentage of this Division. In computing this 20.20% the Master did not credit the United States with the ownership of the shoreline boundaries of the 7,991.6 acres of island and promontory land above 4,093-foot elevation; nor with the riparian lands belonging to the United States because of its ownership of said island and promontory land.

The Master holds (S. M. R. 67) as follows:

> 4. Oregon has no claim whatever in the Malheur Lake Division and the United States is entitled to a decree to the foregoing effect and quieting its title and the title of its grantees against the State of Oregon to all interest in the Malheur Lake Division.

The Master finds (S. M. R. 5) that there are 47,670.40 acres in the Malheur Division and that by following the Neal lines around this Division there are 4723.56 chains or 59.044 miles.

The Master finds (S. M. R. 9) that of the lands adjacent to the Malheur Division 3769.45 chains had been patented to individuals, that the State of Oregon had none of this frontage, and the United States had 954.11 chains, or 11.93 miles in length, adjacent to the Neal lines. None of the illustrative maps in the Master's report show the elevations within the Malheur Division and the one foot interval contours shown by Complainant's Exhibits 3 and 4. None of these maps show the

island and promontory lands above the average elevation of the Neal lines.

The Master holds further as follows:

> [S. M. R. 25]: The evidence shows that the lands above a water surface elevation of 4,093 comprised 7,991.6 acres in Malheur Lake Division, 21.2 acres in the Narrows, 88 acres in the Mud Lake, and 1,227 in the Sand Reef. (See finding XXII, *infra.*)
>
> It has been impossible to furnish a similar table in respect of Harney Lake, because no survey nor measurements for the purpose are available. (See finding XXII, *infra.*)
>
> The acreages above 4,093 are not generally compact bodies, although there are two well-known islands, Pelican Island, 840 acres, and Cole Island, 350 acres, within the Malheur Lake Division. Other Islands, unnamed and unsurveyed within that Division aggregate 4,921.6 acres. The promontories therein aggregate 1,880 acres, thus giving the total 7,991.6 acres above 4,093.
>
> These Islands and promontories are stable lands, and the Conclusions of Law declare them to be the property of the United States (in any and all events).
>
> [S. M. R. 119]: * * * All of the lands within the five Divisions above the elevation of 4,093 are permanent lands and constitute islands and/or promontories.
>
> * * * * *
>
> The lands above water surface, constituting islands and promontories totaling 7,991.6

acres within the Division are made up of the following:

	Acres
(a) Pelican Island	840.0
(b) Cole Island	350.0
(c) All other Islands	4,921.6
(d) Promontories	1,880.0
Total	7,991.6

[S. M. R. 132]: And as the conclusions of law from the foregoing facts, it is declared that the plaintiff is entitled to a decree in terms as annexed.

[S. M. R. 133]: At the admission of the State of Oregon into the Union there were stable lands constituting islands or promontories within the area involved; and all lands above the water-surface elevation of 4093 on that day were stable lands and ever since have been and now are owned in fee simple absolute by the United States of America (except stable lands within the Narrows Division, if any).

If by any theory the Malheur Division should be partitioned according to riparian rules, then the United States would have all lands adjacent to its frontage on the Neal line, plus its frontage upon all promontory and island land. But if the Neal line is in fact merely a traverse line dividing hay land from hay land flooded and irrigated in the spring by flood waters caused by melting snow, and usable later for pasturage, then the United States would own the entire area.

It is not necessary in this case to go further than to say that the United States owns all of the Mal-

heur Division except such as may belong to its patentees of lands adjacent to the Neal survey lines, or their successors, whose rights should not be adjudged herein in their absence.

The State of Oregon (by its exception No. 104) excepts to the recommendation of the Special Master (at page 137 of his report) that a decree be entered providing that:

> This Decree shall neither bind nor inure to the benefit of third persons not parties to this suit except the patentees of the United States of America as such, and their successors in interest, who shall have the benefit of this Decree as against the claims of the State of Oregon in conflict with the titles of the United States of America herein determined to have existed prior to disposal of the uplands.

The ground of its exception is "that such third parties are not parties to this suit and not privy herein."

CONCLUSION

The Government respectfully submits that its exceptions should be sustained.

J. CRAWFORD BIGGS,
Solicitor General.

DAVID E. HUDSON,
Special Assistant to the Attorney General.

BENJAMIN CATCHINGS,
Attorney, Department of Agriculture.

FEBRUARY 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935